Mohd Hanif bin Farikullah v Bushra Chaudri

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO R2–11–9 OF 2000
FAIZA TAMBY CHIK J
4 DECEMBER 2000

Constitutional Law *— Jurisdiction — Civil Court — Whether magistrate's court has jurisdiction to adjudicate on the respondent's application for maintenance where both parties were Muslims and no provisions were made by the state legislature to make them come within the purview of the Syariah Court — Federal Constitution art 121(1A)*

Family Law *— Financial obligation — Maintenance order — Provisions of maintenance for children — — Whether adjudication of maintenance of an illegitimate Muslim child came within the jurisdiction of the civil court — Whether any provisions within the state enactments to exclude the jurisdiction of the civil court — Married Women and Children (Maintenance) Act 1950 — Administration of Muslim Law Enactment 1952 (State of Selangor No 3 of 1952) s 138 — Administration of Islamic Religious Affairs Enactment 1986 (State of Terengganu)*

The respondent is a Pakistani citizen and the appellant lives and works originally in Kuala Terengganu. The appellant was married to the respondent and a son was born to both of them. A divorce order was granted to the appellant on 23 October 1990 wherein the appellant was ordered to pay maintenance for the son in the sum of RM50 per month. After the divorce, the respondent gave birth to a baby girl on 6 October 1996 ('the said baby girl'). After the birth of the said baby girl, the respondent filed an application for maintenance of the said baby girl at the magistrate's court claiming maintenance for the sum of RM1,050 per month. In the absence of the appellant, the court entered judgment against the appellant on 20 March 1997 ('the said judgment') for the sum of RM1,050 and ordered an attachment of salary dated 20 March 1997 against the appellant's employer for deduction of the appellant's salary. The appellant attempted to set aside the said judgment vide a notice of application dated 24 November 1998 but the said judgment was upheld by the magistrate on 12 July 1999. The appellant had appealed against the order dated 12 July 1999 vide Appeal No R2–11–99–1999. Subsequently, the appellant made an application to reduce the maintenance sum of RM1,050 and for a stay of execution of the said judgment vide a notice of application dated 7 September 1999, which was dismissed on 31 January 2000. The appellant had appealed against the order dated 31 January 2000 vide Appeal No R2–11–9–2000. By consent, these appeals were heard together. The issues for determination were: (i) whether the magistrate court had the jurisdiction to hear the respondent's application for maintenance of the said baby girl, having regard to the fact that both parties profess the religion of Islam; and (ii) if the court found that the Married Women and Children (Maintenance) Act 1950 ('the 1950 Act') applied in the case, whether the magistrate court had the jurisdiction to make an order giving maintenance to the said baby girl in a sum exceeding RM50 a month.

Held, dismissing the appeals with costs:

(1) Article 121(1A) of the Federal Constitution does not overrule the general jurisdiction of the civil courts. The main point to note is that the civil courts are courts of general jurisdiction and can hear cases brought about by Muslims as well as by non-Muslims and can try offences against Muslims and non-Muslims that are created by the law of the land. Moreover the civil High Courts are also courts of inherent jurisdiction while the jurisdiction of the Syariah Courts is determined by the state law and if the legislature does not confer on the Syariah Court any jurisdiction to deal with any matter in the state list the Syariah Court is precluded from dealing with that matter. Consequently once a decision is made that the civil court has jurisdiction to hear a matter the court can decide the matter or issue which arises. As to whether the civil judge is competent to hear and decide the matter has nothing to do with the jurisdiction of the court (see p 544E–G).

(2) Since there is no clear provision for maintenance of an illegitimate child from her father in the Islamic Family Law (Federal Territory) Act 1984 ('the 1984 Act'), as could be seen from the facts disclosed before the court, the 1984 Act does not contain a provision which could be applied to the facts of the instant case and as such the respondent had rightly brought the action under the 1950 Act. Furthermore, the 1950 Act is appropriately applicable to the case in issue, as it is a federal legislation and provides an inherent jurisdiction. The Syariah Court do not provide for inherent jurisdiction, therefore the respondent is unable to turn to the Syariah Court for a remedy, especially since there is no one particular section the respondent can resort to in the 1984 Act (see pp 545D–E, 546D–E).

(3) The parties should not be subjected to the application of s 138 of the Administration of Muslim Law Enactment 1952 (State of Selangor Enactment No 3 of 1952) ('the 1952 Enactment') because the respondent is a foreign divorced wife, and is without her husband's domicile and the husband in the meantime works in the state of Terengganu. The Terengganu Administration of Islamic Religious Affairs Enactment 1986 ('the 1986 Enactment') has application in these circumstances and not s 138 of the 1952 Enactment. Section 135 of the 1986 Enactment does not reject the application of the Married Women and Children (Maintenance) Act 1950. Further s 79(2) of the Administration of Islamic Family Law Enactment (Terengganu) allows application such as in the instant case to be brought in the magistrate's court (see p 546F–H).

[**Bahasa Malaysia summary**

Responden merupakan seorang warganegara Pakistan dan perayu menetap dan berkerja pada asalnya di Kuala Terengganu. Perayu

berkahwin dengan responden dan mereka dikurniakan seorang anak lelaki. Satu perintah penceraian diberikan kepada perayu pada 23 Oktober 1990 di mana perayu diperintahkan memberi nafkah kepada anak lelakinya pada jumlah RM50 sebulan. Selepas penceraian itu, responden melahirkan seorang anak perempuan pada 6 Oktober 1996 ('anak perempuan tersebut'). Selepas kelahiran anak perempuan tersebut, responden memfailkan satu permohonan untuk nafkah anak perempuan tersebut di mahkamah majistret menuntut nafkah pada jumlah RM1,050 sebulan. Dalam ketidakhadiran perayu, mahkamah mencatat penghakiman terhadap perayu pada 20 Mac 1997 ('penghakiman tersebut') bagi jumlah RM1,050 dan memerintahkan satu lampiran gaji bertarikh 20 Mac 1997 terhadap majikan perayu untuk potongan daripada gaji perayu. Perayu berusaha mengenepikan penghakiman tersebut melalui satu notis permohonan bertarikh 24 November 1998 tetapi penghakiman tersebut dipertahankan oleh majistret pada 12 Julai 1999. Perayu telah merayu menentang perintah bertarikh 12 Julai 1999 tersebut melalui Rayuan No R2–11–99–1999. Kemudian, perayu membuat permohonan untuk mengurangkan jumlah nafkah RM1,050 dan untuk penangguhan pelaksanaan penghakiman tersebut melalui notis permohonan bertarikh 7 September 1999, yang ditolak pada 31 Januari 2000. Perayu telah merayu menentang perintah yang bertarikh 31 Januari 2000 tersebut melalui Rayuan No R2–11–9–2000. Dengan kebenaran, rayuan-rayuan ini dibicarakan bersama. Perkara-perkara untuk diputuskan ialah: (i) sama ada mahkamah majistret mempunyai bidangkuasa untuk membicarakan permohonan responden untuk nafkah anak perempuan tersebut, setelah mempertimbangkan bahawa kedua-dua pihak menuntut diri mereka sebagai penganut agama Islam; dan (ii) jika mahkamah mendapati bahawa Akta Perempuan Bersuami dan Anak-Anak (Nafkah) 1950 boleh dipakai dalam kes ini, sama ada mahkamah majistret mempunyai bidangkuasa untuk membuat perintah memberi nafkah yang melebihi RM50 sebulan kepada anak perempuan tersebut.

Diputuskan, menolak rayuan-rayuan tersebut dengan kos:

(1) Artikel 121(1A) Perlembagaan Persekutuan tidak menolak bidangkuasa umum mahkamah sivil. Perkara utama yang perlu diketahui adalah bahawa mahkamah sivil adalah mahkamah bidangkuasa umum dan boleh membicarakan kes yang dikemukakan oleh penganut agama Islam dan bukan Islam dan boleh membicarakan kesalahan penganut agama Islam dan bukan Islam yang diwujudkan oleh undang-undang negara. Selain itu, Mahkamah-mahkamah Tinggi Sivil juga merupakan mahkamah dengan bidangkuasa sedia ada manakala bidangkuasa Mahkamah Syariah diputuskan oleh undang-undang negeri dan jika perundangan tidak memberikan Mahkamah Syariah apa-apa bidangkuasa untuk menngendalikan apa-apa perkara dalam senarai negeri, Mahkamah Syariah dikecualikan dari

membicarakan perkara tersebut. Oleh itu, sebaik sahaja satu keputusan dibuat bahawa mahkamah sivil mempunyai bidangkuasa membicarakan sesuatu perkara, mahkamah boleh memutuskan perkara atau isu yang dikemukakan. Persoalan sama ada hakim sivil cukup kompeten untuk membicarakan dan memutuskan perkara tersebut tiada kaitan dengan bidangkuasa mahkamah (lihat ms 544E–G).

(2) Oleh kerana tiada peruntukan yang jelas mengenai nafkah seorang anak luar nikah dari ayahnya dalam Akta Undang-Undang Keluarga Islam (Wilayah-Wilayah Persekutuan) 1984 ('Akta 1984 tersebut'), seperti yang dapat dilihat di dalam fakta yang dikemukakan di hadapan mahkamah, Akta 1984 tersebut tidak mempunyai peruntukan yang boleh dipakai pada fakta-fakta kes ini dan kerana ini, responden bertindak betul dengan membawa tindakan tersebut di bawah Akta 1950 tersebut. Lagipun, Akta 1950 tersebut memang sesuai dipakai pada kes ini kerana ia merupakan undang-undang persekutuan dan memberi bidangkuasa sedia ada. Mahkamah Syariah tidak mempunyai bidangkuasa sedia ada, oleh itu, responden tidak boleh mendapatkan bantuan dari Mahkamah Syariah untuk memperolehi remedi, terutamanya kerana tiada seksyen khusus yang boleh dirujuk oleh responden dalam Akta 1984 tersebut (lihat ms 545D–E, 546D–E).

(3) Pihak-pihak tidak harus diwajibkan memakai s 138 Enakmen Pentadbiran Undang-Undang Islam 1952 (Enakmen Negeri Selangor No 3, 1952) ('Enakmen 1952 tersebut') kerana responden adalah seorang isteri dicerai asing, dan tidak mempunyai domisil suaminya dan suaminya buat masa itu berkerja di Terengganu. Enakmen Pentadbiran Hal Ehwal Agama Islam Terengganu 1986 ('Enakmen 1986 tersebut') boleh dipakai dalam semua hal keadaan berikut dan bukannya s 138 Enakmen 1952. Seksyen 135 Enakmen 1986 tidak menolak penggunaan Akta Perempuan Bersuami dan Anak-Anak (Nafkah) 1950. Selain itu, s 79(2) Enakmen Pentadbiran Undang-Undang Keluarga Islam (Terengganu) membenarkan permohonan seperti dalam kes ini dikemukakan di mahkamah majistret (lihat ms 546F–H).]

Notes

For a case on the jurisdiction of the civil court, see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) para 1661.

For cases on maintenance order, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2562–2567.

Cases referred to

Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors [1999] 5 MLJ 618 (refd)

Commissioner for Religious Affairs, Terengganu & Ors v Tengku Mariam [1969] 1 MLJ 110 (refd)
Lim Chan Seng lwn Pengarah Jabatan Agama Islam Pulau Pinang & satu kes yang lain [1996] 3 CLJ 231 (refd)
Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & satu yang lain [1992] 2 MLJ 244 (refd)
Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur [1998] 1 MLJ 681 (refd)
Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib [1992] 2 MLJ 793 (refd)
Myriam v Mohamed Ariff [1971] 1 MLJ 265 (refd)
Shahamin Faizul Kung bin Abddulah v Asma bte Hj Junus [1991] 3 MLJ 327 (refd)
Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1994] 1 MLJ 690 (refd)
Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Ano [1999] 1 MLJ 489 (refd)
Sukma Darmarwan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 1 MLJ 266 (refd)

Legislation referred to

Administration of Islamic Religious Affairs Enactment 1986 (State of Terengganu) s 79(2), 135
Administration of Muslim Enactment 1952 (State of Selangor Enactment No 3 of 1952) s 138(1)Evidence Act 1950 s 45
Federal Constitution arts 74, 121, 121(1A)
Federal Territories (Modification of Administration of Muslim Law Enactment) Order 1974
Islamic Family Law (Federal Territory) Act 1984 s 111, 80(1), (2)
Married Women and Children (Maintenance) Act 1950 s 3(2), (3), 13, 135

Appeal from: Maintenance Case No 78–1 of 1997 (Magistrate's Court, Kuala Lumpur)

Norlidah Abu Bakar (*Hisham Sobri & Kadir*) for the appellant.
Yasmeen Sharif (*Mahani Hamid & Yasmeen*) for the respondent.

Faiza Tamby Chik J. : There are two appeals before me involving the same parties. By consent they are heard together. In Rayuan Sivil No R2–11–9–2000 the appellant, Mohd Hanif bin Farikullah, is appealing against the whole decision of the Magistrate Court's Kuala Lumpur given on 31 January 2000 dismissing with costs the appellant's application dated 7 September 1999 praying for a stay of execution of the order dated 20 March 1997 and also praying for a reduction of maintenance order from RM1,050 to RM200. In Rayuan Sivil No R2–11–99–1999 the same appellant Mohd Hanif bin Farikullah is appealing against the whole decision of the Magistrate Court Kuala Lumpur given on 12 July 1999

dismissing with costs the appellant's application dated 24 November 1998 praying for setting aside the judgment in default dated 20 March 1997.

In the instant case, the brief facts leading up to these appeals were that the appellant was married to the respondent on 6 October 1986. A son was born to the appellant and the respondent who was named Muhammad Osman bin Mohd Hanif (para 5 p 43 of the record of appeal referred). Thereafter, the appellant commenced divorce proceedings against the respondent in the Syariah Subordinate Court in the Federal Territory in the Civil Case No 813/90. A divorce order ('the said order') was granted to the appellant on 23 October 1990. By the said order the appellant was ordered to pay maintenance for the son in the sum of RM50 per month (pp 49–50 of the record of appeal referred). After the divorce of the appellant and the respondent, the respondent gave birth to a baby girl on 6 October 1996 who was named Natasha bte Mohd Hanif ('the said baby girl') (para 2, p 3 of the record of appeal referred). After the birth of the said baby girl, the respondent filed an application for maintenance for the said baby girl at the Magistrate Court's at Kuala Lumpur in Maintenance Case No 78–1–97 claiming the maintenance for the sum of RM1,050 per month (p 1 of the record of appeal referred). In the absence of the appellant, the court entered judgment against the appellant ('the said judgement') on 20 March 1997 for the sum of RM1,050 and ordered an attachment of salary dated 20 March 1997 against the appellant's employer for deduction of the appellant's salary. The appellant attempted to set aside the said judgement vide a notice of application dated 24 November 1998 but the said judgment was upheld by the magistrate on 12 July 1999. The appellant has appealed against the order dated 12 July 1999 vide Appeal No R2–11–99–99 (para No 4, pp 31–32 record of appeal referred). Subsequently thereafter, the appellant made an application to reduce the maintenance sum of RM1,050 payable to the said baby girl vide a notice of application dated 7 September 1999. The magistrate dismissed the application on 31 January 2000.

The issues raised by the appellant before me are:

(i) whether the magistrate's court has the jurisdiction to hear the respondent's application for maintenance of the said baby girl, having regard to the fact that both parties profess the religion of Islam; and

(ii) if this honourable court finds that the Married Women and Children (Maintenance) Act 1950 applies in this case, whether the magistrate's court has the jurisdiction to make an order giving maintenance to the said baby girl in a sum exceeding RM50 a month.

It is to be noted that one important effect of the amendment of art 121 of the Federal Constitution by the inclusion of a new art 121(1A) of the Federal Constitution is to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil courts which had occurred in a number of cases before. (See *Myriam v Mohamed Ariff* [1971] 1 MLJ 265 and *Commissioner for Religious Affairs, Terengganu & Ors v Tengku Mariam* [1969] 1 MLJ 110). In *Sukma Darmarwan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266, the Court of Appeal said at pp 279–280:

Prior to the introduction of art l21(1A), the ordinary courts had the power to review, and quite regularly reviewed, the decisions of Syariah Court by certiorari. That this caused some concern among those entrusted with the task of administering Muslim law is reflected in the speech delivered in the Dewan Rakyat when introducing the Bill that eventually became Act A704/88. We say at once that we are, in the circumstances of the present case, entitled to refer to the proceedings during the debate of the Bill in the Dewan Rakyat. No question of parliamentary privilege arises here. That we are entitled to make such reference is now settled by the decision of the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 which followed the majority speeches of the House in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42. Having examined the Hansard of the Dewan Rakyat, we find support for the conclusion that the limited purpose of Act A704/88 was to prevent the High Court from exercising its powers of judicial review over decisions of a Syariah Court.

In our view, art 121(1A) should receive that meaning which advances the purpose for which it was introduced into the Federal Constitution. If it becomes necessary to make an implication, as we think the present case does, then we shall make it. We are satisfied that such an approach would harmonize the article in question with the rest of the Constitution. It would, as contended by the respondents, certainly remove the spectre of a conflict between that article and other provisions of the Constitution, in particular the Ninth Schedule, with regard to any question of legislative competence upon the subject of criminal law. Equally, it will ensure that well-established provisions of the Penal Code (FMS Cap 45) are not rendered nugatory. In deciding upon this course, we are really following a well-trodden path of constitutional interpretation.

Accordingly, in the light of the authorities we have referred to earlier in this judgment, we have come to the conclusion that the expression 'jurisdiction of the Syariah Courts' refers to 'the *exclusive* jurisdiction' of those courts. In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code (FMS Cap 45) and the Act, then the courts referred to in art 121(1) will have jurisdiction to try such an offence. It is only in respect of offences under the Act that a Syariah Court may have exclusive jurisdiction. For example, the offence of adultery which is prescribed as an offence under the Act has no equivalent in the Penal Code (FMS Cap 45) or other federal criminal statutes. So if a person professing the religion of Islam commits adultery, then he or she may be tried only in a Syariah Court.

The new art 121(1A) of the Federal Constitution reads, '(1A) The courts referred to in cl (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts'. This new clause was inserted and became effective from 10 June 1988. However in July 1991, approximately three years later Edgar Joseph Jr J (as he then was) in *Shahamin Faizul Kung bin Abddulah v Asma bte Hj Junus* [1991] 3 MLJ 327 reverted to the old position. At p 330 the learned judge in that case said:

My research into the authorities (not cited to the court) compels me to the conclusion that although the Administration of Muslim Law Enactment 1959, Penang, does expressly confer general civil jurisdiction on the court of the kadi besar to hear and determine proceedings where the parties profess the Muslim religion and which relate, inter alia, to the guardianship or custody of

> infants, such jurisdiction is not exclusive. This is emphasized by the fact that the Guardianship of Infants Act 1961 has been expressly adopted (subject to the provisions of a proviso which do not affect the present case) to persons professing the Muslim religion within the State of Penang by the Guardianship of Infants (Adoption) Enactment 1961. Furthermore, the very wide terms of ss 23 and 24 of the Courts of Judicature Act 1964 when read together with s 4 of the same Act, to which I have referred above, provide strong reinforcement for that conclusion.
>
> It makes no difference, therefore, that the Administration of Muslim Law Enactment 1959 of Penang does not expressly state, as do most of the equivalent State Enactments in the States of Malaya, that nothing in the Enactment shall affect the jurisdiction of any civil court and that in the event of any difference or conflict arising between a decision of a court of the kadi besar or a kadi and the decision of a civil court acting within its jurisdiction, the decision of the civil court shall prevail. Had there been such a provision in the Administration of Muslim Law Enactment 1959 of Penang, the position would, in my opinion, have been merely a fortiori.

However, in December 1992, *Shahanin*'s case was overruled by the Supreme Court in *Mohamed Habibullah bin Mahmood v Faridah bte Dato' Talib* [1992] 2 MLJ 793 whereby the Supreme Court reaffirmed the effect of the amendment by holding that the intention of Parliament by art l21(1A) of the Federal Constitution is to take away the jurisdiction of the High Courts in respect of any matter within the jurisdiction of the Syariah Court. How does one determine whether a matter is or is not within the jurisdiction of the Syariah Court? In the *Mohamed Habibullah*'s case, Harun Hashim SCJ said at p 800:

> I am therefore of the opinion that when there is a challenge to jurisdiction as here, the correct approach is to firstly see whether the Syariah Court has jurisdiction and not whether the state legislature has power to enact the law conferring jurisdiction on the Syariah Court.

Before *Mohamed Habibullah*, the Supreme Court in May 1992 in the case of *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & satu yang lain* [1992] 2 MLJ 244 stated that when a civil court hears a claim for an order and the order that is applied for did not fall within the jurisdiction of the Syariah Court to issue, the civil court should hear the claim and if, in the course of such hearing, a question regarding 'hukum syarak' should arise the parties involved may call experts in the religion of Islam to give evidence at the hearing; or the court can refer the questions to the fatwa committee concerned for certainty on the matter. Therefore in the *Majlis Agama Islam Pulau Pinang*'s case the Supreme Court dismissed the appeal and held:

> (1) It was clear from the respondents' statement of claim that the real order asked for by the respondents was a perpetual injunction to restrain the appellant or its agents from demolishing the said mosque and to restrain the appellant from taking any preliminary steps to demolish the mosque and erect a commercial building on the site.
>
> (2) After examining the provisions in the Administration of Muslim Law Enactment 1959 (Penang), it was found that the court of the chief kadi

and the court of the kadi did not have jurisdiction to issue the injunction as applied for by the respondents.

(3) Matters of injunction were provided for in Part III of the Specific Relief Act 1950, and the power to issue an injunction was only given to the High Court. It was clear that the respondents' claim for perpetual injunction could only be heard by the High Court.

On 2 February 1994, in the case of *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1994] 1 MLJ 690 Wan Adnan Ismail J (as he then was) dismissed the application brought by the plaintiff who converted to Islam and changed his name on 14 March 1988 but reconverted to Sikhism on 16 July 1992 and executed a deed poll to renounce the religion of Islam on 27 July 1992 to revert to his original Sikh faith and to use his original Sikh name. In that case, Wan Adnan Ismai J (as he then was) held:

> It is clear from the fatwa that a Muslim who renounced the Islamic faith by a deed poll or who went through a baptism ceremony to reconvert to Sikhism continues to remain in Islam until a declaration has been made in a Syariah Court that he is a 'murtad'. Therefore, in accordance with the fatwa, the plaintiff is still a Muslim. He should go to a Syariah Court for the declaration. Whether or not his conversion is invalid is also a matter for the Syariah Court to determine in accordance with hukum syarak and the civil courts have no jurisdiction.

On 4 June 1996, Abdul Hamid Mohamed J (as he then was) in the case of *Lim Chan Seng lwn Pengarah Jabatan Agama Islam Pulau Pinang & satu kes yang lain* [1996] 3 CLJ 231 said obiter at p 237:

> [1] This court subscribes to the view that the Syariah Court would be the better forum wherein to try and hear cases concerning Syariah law. Nonetheless, cases are decided according to law, and so, if the state legislature, despite the power given it by the Federal Constitution to enact laws, had not elected to do so, the court should not, and cannot usurp that power or substitute itself for that role.
>
> [2] It is incorrect to say that the issue of conflict of jurisdiction between the Syariah Court and the civil court has been resolved by art 121(1A) of the Federal Constitution for two main reasons. Firstly, the Syariah Court has the jurisdiction merely over the Muslims whereas issues concerning Islamic law may arise in cases where one of the parties is not a Muslim. Secondly, issues concerning Islamic law may arise together with other laws which properly come under the jurisdiction of the civil court. Disputes regarding land law, for instance, may arise together with issues on wakaf land.
>
> [3] One way to overcome the conflict of jurisdiction between the two courts is by giving the civil court power to hear and decide all the issues in the case including issues pertaining to Syariah law. However during the trial the civil court judge shall be assisted by a Syariah Court judge and the latter's decision on Syariah law shall be binding against the civil court. Another drastic solution would be by combining both the courts, which means that Syariah judges should also be appointed to the civil court. Consequently, issues concerning the two jurisdictions shall be presided and heard by both the Judges. The civil judge will decide upon the civil

matters while the Syariah Judge, on his part, will decide on the Syariah matters.

However, in November 1997 Abdul Kadir Sulaiman J (as he then was) in the case of *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan Kuala Lumpur* [1998] 1 MLJ 681, took the view that so long as a matter is provided in the state list, the Syariah Court has jurisdiction over it, even if the state legislature has not passed any law on the matter. At pp 688–689, the learned judge said:

> I am more convinced of my view expressed earlier that this matter of the plaintiff which involves the determination of his status upon his purported renunciation of the Islamic faith by the deed poll and the statutory declaration is outside the jurisdiction of this court to determine, on account of the ouster of the jurisdiction by art 121(1A) of the Federal Constitution. By virtue of para 1 in List II of the Ninth Schedule to the Federal Constitution, the jurisdiction lies with the Syariah Court on its wider jurisdiction over person professing the religion of Islam even if no express provisions are provided in the Act because under art 74 of the Constitution, it is within the competency of the legislature to legislate on the matter. Its absence from the express provision in the Act would not confer the jurisdiction in the civil court. The fact that the plaintiff may not have his remedy in the Syariah Court would not make the jurisdiction exercisable by the civil court.

In April 1999, Abdul Hamid Mohamed J (as he then was) expressed the view that the approach taken by the *Md Hakim Lee*'s case was contrary to what had been said by the Supreme Court in *Mohamed Habibullah*'s case and suggested how the court should approach the problem in *Abdul Shaik bin Md Ibrahim & Anor v Hussein bin Ibrahim & Ors* [1999] 5 MLJ 618 at p 623:

> How should the court approach the problem? There are two issues in this question. First, regarding the law conferring jurisdiction, should the court look at the State Enactments or List II — State List in the Ninth Schedule of the Federal Constitution (the 'State list')? Secondly, regarding the matter before the court, should the court look at the subject matter of the action or the remedies prayed for?
>
> Regarding the first question, there are two views, the view I took in *Lim Chan Seng lwn Pengarah Jabatan Agama Islam Pulau Pinang dan satu kes yang lain* [1996] 3 CLJ 231 is that the court should look at the State Enactments. On the other hand, my learned brother Abdul Kadir Sulaiman J in *Md Hakim Lee v Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1998] 1 MLJ 681 took the view that the court should look at the State List, even if the State Legislature has not made law on the matter.

However on 5 March 1999, the Federal Court in the case of *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 stated on pp 501–503:

> From the analysis of the State Enactments, it is clear that all State Enactments and the Federal Territories Act contain express provisions vesting the Syariah Courts with jurisdiction to deal with conversion to Islam. On the other hand, only some State Enactments expressly confer jurisdiction on the Sayriah courts to deal with conversion out to Islam. In this regard, we share the view

of Hashim Yeop A Sani CJ (Malaya) in *Dalip Kaur* at p 7, that 'clear provisions should be incorporated in all State Enactments to avoid difficulties of interpretation by the civil courts,' particularly in view of the new cl (1A) of art 121 of the Constitution which as from 10 June 1988 had taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts. Be that as it may, in our opinion, the jurisdiction of the Syariah Courts to deal with the conversion out of Islam, although not expressly provided in the State Enactments, can be read into them by implication derived from the provisions concerning conversion into Islam. It is a general rule of construction that if the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication and the court may draw inferences or supply the obvious omissions. *Caies on Statute Law* (7th Ed) p 112, states that an express and unambiguous language appears to be absolutely indispensable in statutes passed for the following purposes: imposing tax; conferring or taking away legal rights; excepting from the operation of or altering clear principles of law; altering the jurisdiction of courts of law, which in the words of Tindal CJ in *Albon v Pyke* (1842) 4 M & G 421 at p 424: 'the general rule undoubtedly is, that the jurisdiction of the superior courts is not taken away, except by express words or necessary implication'. In the instant case, in our opinion, the general rule of construction applies and the court can have recourse to a construction by implication. Implication may arise from the language used, from the context, or from the application of some external rule. They are of equal force, whatever their derivation (*Bennion's Statutory Interpretation* (2nd Ed) p 362). It is quite clear to us that the legislative purpose of the state Enactments and the Act is to provide a law concerning the enforcement and administration of Islamic law, the constitution and the enforcement and administration of Islamic law, the constitution and organization of the Syariah Courts and related matters. Therefore, when jurisdiction is expressly conferred on the Syariah Courts to adjudicate on matters relating to conversion to Islam, in our opinion, it is logical that matters concerning conversion out of Islam (apostasy) could be read as necessarily implied in and falling within the jurisdiction of the Syariah Courts. One reason we can think of is that the determination of a Muslim convert's conversion out of Islam involves inquiring into the validity of his purported renunciation of Islam under Islamic law in accordance with hukum syarak (*Dalip Kaur*). As in the case of conversion to Islam, certain requirements must be complied with under hukum syarak for a conversion out of Islam to be valid, which only the Syariah Courts are the experts and appropriate to adjudicate. In short, it does seem inevitable that since matters on conversion to Islam come under the jurisdiction of the Syariah Courts, by implication conversion out of Islam should also fall under the jurisdiction of the same courts.

We hasten to add that both the learned judge in the instant case and Abdul Kadir Sulaiman J in *Md Hakim Lee*, for different reasons, also had recourse to a construction by implication to found the jurisdiction of the Syariah Court to deal with the question of conversion out of Islam. Abdul Kadir Sulaiman J, in particular, adopted a liberal interpretation of the Wilayah Act. On the other hand, Abdul Hamid J in *Lim Chan Seng* applied a strict interpretation by confining the meaning of the word 'jurisdiction' to the express jurisdiction of the Syariah Courts enacted in the State Enactments, where in that case he found no express provisions in the Penang State Enactment. Whilst we agree with the approach adopted by Abdul Hamid J following *Habibullah*, that when there is a challenge to jurisdiction the correct

approach is to look at the State Enactment to see whether or not the Syariah Courts have been expressly conferred jurisdiction on a given matter, with respect, we do not agree with his Lordship's conclusion that since the Penang Enactment did not expressly confer jurisdiction on the Syariah Court over the matter raised, there was no impediment for the civil court to hear and dispose of the matter.

It is noted that as from 10 June 1988 by virtue of cl 1A of art 121 of the Federal Constitution, the civil courts have no jurisdiction in respect of matters within the jurisdiction of the Syariah Courts. Islamic law applies to Muslims only and it's administration under the Federal Constitution is generally the responsibility of the state legislatures. Under art 74 of the Federal Constitution the legislature of a state may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List. This means the State Legislature can basically legislate matters as specified in the State List; while the Federal Parliament can only legislate on matters dealing with Islamic law and religion for the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. Therefore, the State List as set out in the Ninth Schedule by itself does not automatically create and empower the Syariah Courts over the matters contained in the State List unless and until the State Legislative has legislated and passed laws conferring jurisdiction over those matters to the Syariah Courts. It is observed here that while the legislature of a State has power to pass laws conferring jurisdiction over matters contained in the State List to the Syariah Court, art 121(1A) of the Federal Constitution gives only exclusive jurisdiction to the Syariah Courts in respect of any matter within the jurisdiction of the Syariah Courts. It can be seen here that art 121(1A) of the Federal Constitution does not overrule the general jurisdiction of the civil courts. The main point to note here is that the civil courts are courts of general jurisdiction and can hear cases brought about by Muslims as well as by non-Muslims and can try offences against Muslims and non-Muslims that are created by the law of the land. Moreover, the civil High Courts are also courts of inherent jurisdiction while the jurisdiction of the Syariah Courts is determined by the State Law and if the legislature does not confer on the Syariah Court any jurisdiction to deal with any matter in the State List the Syariah Court is precluded from dealing with that matter. Consequently, once a decision is made that the civil court has jurisdiction to hear a matter the court can decide the matter or issue which arises. As to whether the civil judge is competent to hear and decide the matter has nothing to do with the jurisdiction of the court. This can be approached in two stages. If the civil judge is simultaneously also appointed by the ruler of a state to be an appeal judge in the Syariah Appeal Court or has obtained a syariah qualification recognized by the state Syariah Court, he is competent to hear and decide the matter. Otherwise, he can refer the matter to a Muslim jurist or a fatwa in order to assist him to make a decision. This is provided for by s 45 of the Evidence Act 1950 on opinion of experts.

In the instant case the appellant submitted that s 13 of the Married Women and Children (Maintenance) Act 1950 ('the said Act') does not

apply to persons professing the religion of Islam. Section 13 of the said Act, inter alia, states:

> This Act shall not apply to any person professing the religion of Islam and whose wife or whose legitimate or illegitimate child, as the case may be, professes the religion of Islam, if under the law in force in such state there is provision for the making of order for the maintenance of wives and of children, legitimate and illegitimate, and for the enforcement of such orders against such persons professing the religion of Islam.

In the instant case, the respondent made an application for maintenance under s 3(2) and (3) of the Married Women and Children Act 1950 (Act 263).

Section 3(2) provides:

> If any person neglects or refuses to maintain an illegitimate child of his which is unable to maintain itself, a court upon due proof thereof, may order such person to such monthly allowance, as to the court seems reasonable.

Section 3(3) provides:

> Such allowance shall be payable from the date of such neglect or refusal or from such later date as may be specified in the order.

I am of the view that since there is no clear provision for maintenance of an illegitimate child from her father in the Islamic Family Law (Federal Territory) Act 1984, as can be seen from the facts disclosed before the Court, the Islamic Family Law (Federal Territory) Act 1984 does not contain a provision which can be applied to the facts of the instant case and as such the respondent, I think, has rightly brought this action under the Married Women and Children (Maintenance) Act 1950. It is observed that the current s 80 of the Islamic Family Law (Federal Territory) Act 1984 (Act 303) states:

> Duty to maintain illegitimate
>
> (1) If a women neglects or refuses to maintain her illegitimate child who is unable to maintain himself or herself, other than a child born as a result of rape, the court upon due proof thereof, may order the woman to make such monthly allowance as the court thinks reasonable.
> (2) Deleted (Act A902).
> (3) A monthly allowance under this section shall be payable from the date of commencement of the neglect or refusal to maintain or from such later date as may be specified in the order.

It is also to be observed that the former s 80 of the Islamic Family Law (Federal Territory) Act 1984 had a sub-s (2) which read as follows:

> Section 80(2) (now deleted).
> If a claim is made against the putative father, it shall be brought in the magistrate's court which may order him to make such monthly allowance as the court thinks reasonable.

Therefore with the deletion of s 80(2) of the Islamic Family Law (Federal Territory) Act 1984 there is now a lacuna. I have in this case before me a foreign wife, with a little baby girl and a young son and no job or source of

income except for the charity of the women's organization (which I am made aware in the submission) who provided shelter for a limited time to the respondent because the Women's Aid Organization has a policy which does not allow their residents to stay under their care for a period longer than three months, so as to give other needy women an opportunity to shelter in their home. However several times the rules of the organization were bent to accommodate the respondent and her children. The respondent, a Pakistani citizen, met the appellant when he was a medical student in Pakistan. The respondent is not a permanent resident in Malaysia and has no work permit to enable her to work in Malaysia. Instead she has to run around and beg officers at the Biro Bantuan Guaman to give her recommendation and support letters to enable her to apply for monthly visas at the Immigration Department. Every month, she is living in fear as to whether she would be deported out of the country if she is deprived of a visa and not having valid passports for her children. She is presently living in a dilemma not knowing what would happen to her children if she was refused a visa as both her children are Malaysian citizens. I think the Married Women and Children (Maintenance) Act 1950 is the only legislature she could resort to. Further, I am of the view that this Act is appropriately applicable to the case in issue, as it is a federal legislation and provides an inherent jurisdiction. The Syariah Courts do not provide for inherent jurisdiction, therefore the respondent is unable to turn to the Syariah Courts for a remedy, especially since there is no one particular section she can resort to in the Islamic Family Law (Federal Territory) Act 1984. I am of the view that since s 80(2) of the Islamic Family Law (Federal Territory) Act 1984 (Act 303) is deleted, accordingly s 138(1) of the Selangor Administration of Muslim Enactment 1952 should also have been amended. However, this was not done. Therefore, s 138(1) has no application in this case.

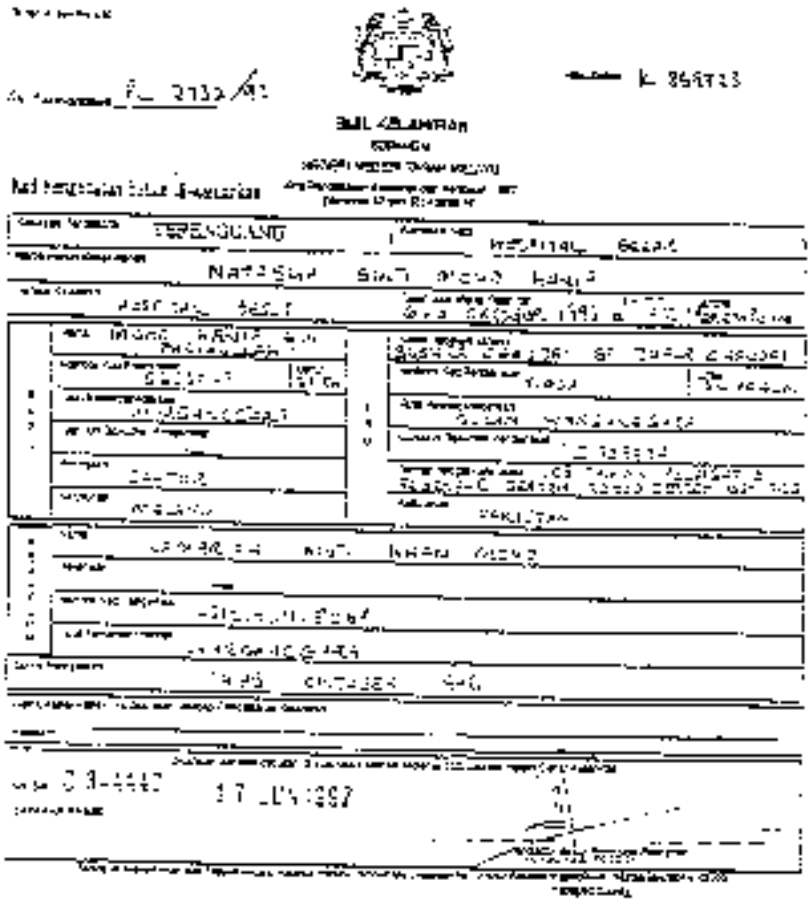
Another matter to be considered here is that the respondent is a Pakistani citizen, and the appellant who lives and worked originally in Kuala Terengganu. Can the parties be subjected to the application of s 138 of the Administration of Muslim Law Enactment 1952 (State of Selangor Enactment No 3 of 1952)? I think they should not because the respondent is a foreign divorced wife, and is without her husband's domicile and the husband in the meantime works in the State of Terengganu. I am of the view that the Terengganu Administration of Islamic Religious Affairs Enactment 1986 has application in these circumstances and not s 138 of the Administration of Muslim Law Enactment 1952 (State of Selangor Enactment No 3 of 1952). It is noted that the Terengganu Administration of Islamic Religious Affairs Enactment 1986 does not reject the application of the Married Women and Children (Maintenance) Act 1950 (see s 135). Further s 79(2) of the Administration of Islamic Family Law Enactment (Terengganu) allows application such as in the instant case to be brought in the magistrate's court. In fact, s 135 of the Terengganu Administration of Islamic Religious Affairs Enactment 1986 goes on to say:

> 135 In matters of practice and procedure in civil proceedings, not expressly provided for in this enactment or any rules made there under, the court

A shall have regard to the avoidance of injustice and the convenient despatch of business and may have regard to the practice and procedure obtaining in the magistrate's courts in civil proceedings.

It is the submission of the appellant that s 80(1) of the Islamic Family Law (Federal Territory) Act 1984 shows that the issue of enforcement of
B maintenance for Muslim illegitimate children fall on the mother who is made responsible and not the putative father. In the instant case the mother, who is the respondent, is bringing an action for maintenance against the natural and biological father of the child, who given the facts of the case had led her to believe that she was still married to him when the child in question was conceived. In the peculiar circumstances of the case the natural father
C should be made responsible for the maintenance of the child. There is a prima facie evidence that the appellant is the natural father of the said child. The birth certificate of the said child reads:

D



E

F

G

H

I

Even the said child's International Passport carries the name of the appellant as the father and it was the appellant who signed the application

form for the child's International Passport. Consequently s 111 of the Islamic Family Law (Federal Territory) Act 1984 does not arise here at all. The appellant has never denied paternity prior to this. The appellant should not be allowed to raise this new defence at the eleventh hour. I therefore hold that s 111 has no application in the instant case. Accordingly, I also hold that the provisions of the Federal Territories (Modification of Administration of Muslim Law Enactment) Order 1974, s 138(1) of the Administration of Muslim Law Enactment 1952 (State of Selangor Enactment No 3 of 1952) and s 80 of the Islamic Family Law (Federal Territory) Act 1984 will have no application in the instant case. In view of what I have said earlier as to the peculiar facts of the instant case, I am bound to hold that the magistrate's court has jurisdiction to hear the wife's maintenance application. The decision of the Magistrate Court's Kuala Lumpur given on 31 January 2000 and 12 July 1999 are hereby respectively upheld and affirmed. In my opinion the appeals by the father are ill-founded.

The appeals must be dismissed with costs.

Appeals dismissed with costs.

Reported by Moy Saw Han